REMARKS

Claims 1-4 and 8 are pending. Applicants have cancelled claims 5-7 but reserve the right to pursue the cancelled subject matter in the future. Claim 1 has been amended to include the recitation of cancelled claim 5. Specifically, claim 1 has been amended to include a light-reflective surface formed on the side of the gas-permeable window facing the reagent absorbent material. Claim 8 has been added and is directed to a gas detecting device that employs the gas detecting element of claim 1. Support for new claim 8 is located, for example, in original claims 6 and 7. No new matter has been added into the claims.

Response to Rejection Under 35 U.S.C. § 102(b)

Claims 6-7 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Leiner, U.S. Patent No. 5,496,521 ("Leiner"). Claims 6-7 have been cancelled and therefore the rejection no longer applies and should be withdrawn.

Response to Rejection Under 35 U.S.C. §103(a)

Claims 1-4 have been rejected under 35 U.S.C. § 103(a) as being obvious over Leiner and claim 5 has been rejected under 35 U.S.C. § 103(a) as being obvious over Leiner in view of Sullivan *et al.*, U.S. Patent no. 6,207,119 ("Sullivan *et al.*"). The rejection is improper because the references do not account for every element of the claims. Specifically, the rejection does not account for (1) a hallow container having opposing windows or (2) an optical density detection window. To establish *prima facie* obviousness, all the claim limitations must be accounted for. *In re Vaeck*, 947 F.2d 488 (Fed. Cir.1991); *In re Royka*, 490 F.2d 981 (CCPA 1974). The Board of Patent Appeals and Interferences recently stated:

> When determining whether a claim is obvious, an examiner must make a searching comparison of the claimed invention – *including all its limitations* – with the teaching of the prior art." *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995). Thus, "obviousness requires a suggestion of all limitations in a claim." *CFMT, Inc. v. Yieldup Intern. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing *In re Royka*, 490 F.2d 981, 985 (CCPA 1974)). Moreover, as the Supreme Court recently stated, "*there must be some articulated reasoning*

> with some rational underpinning to support the legal conclusion of obviousness." *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006)

In re Wada and Murphy, Appeal 2007-3733 (Bd. Pat. App. & Inter. 2008).

Leiner does not describe a hollow container having opposing windows. The instant claims are directed to a gas detecting element comprising a hollow container having a non-gas permeable optical density detection window on one side of the container and a gas-permeable window on the other side of the container (between the two windows is a reagent). Leiner is configured without any opposing windows. The buffer solution accesses reservoir 8 through channel 7.

Furthermore, Leiner does not even describe an optical density detection window. The rejection states that optical density detection windows are common and well-known in the art but does not support this assertion with any evidence or additional references. Specifically, the rejection states, "Leiner does not specifically disclose that the optical density detection device has an optical window. However, it is common and necessary to separate the chemicals from the optical detection device by an optical window that is not gas-permeable." Office Action dated December 22, 2008 p. 4.

A rejection based on the assertion that the claimed subject matter is "well known in the art" without citing a prior art reference is improper where the facts asserted to be well known are not capable of instant and unquestionable demonstration. *In re Ahlert*, 424 F.2d, 1088, 1091 (CCPA 1970). It is never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection is based. *See, e.g., Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001). Therefore, the rejection is improper and should be withdrawn.

In view of the above, consideration and allowance are respectfully solicited.

In the event the Examiner believes an interview might serve in any way to advance the prosecution of this application, the undersigned is available at the telephone number noted below.

The Office is authorized to charge any necessary fees to Deposit Account No. 22-0185.

Applicant believes no fee is due with this response. However, if a fee is due, please charge our Deposit Account No. 22-0185, under Order No. 21398-00038-US1 from which the undersigned is authorized to draw.

Dated: April 22, 2009

Respectfully submitted,

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